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## MTAA assistance

- MTAA recognizes that automotive repairers want to understand their business rights and obligations when faced with expensive repairs costs caused by the failure of parts used in repair jobs that are no fault of their own.
- Although the information in this brief highlights low levels of protection against the effects of product liability for automotive businesses from Australian Commonwealth law and legislation (including Australian Consumer Law (ACL)), MTAA was influential in recently amending ACL to include Section 46 (commonly referred to as the 'Effects Test') which helps prevent anti-competitive business behaviour and is advocating for increased business protection.
- The information within this brief should be used in conjunction with material provided by MTAA state and territory association members which highlights how product liability is addressed through each individual Australian state and territory jurisdictional legislation.

## Product liability and the automotive industry

- Many automotive repair businesses rely on the quality of parts used when repairing vehicles. If these parts fail, the consequences often go far beyond the value of the individual part. For example, a relatively in-expensive oil seal used when reconditioning an engine may fail causing extensive engine damage.
- Under provisions within ACL, the **automotive repairer is liable for the costs of repairing the engine (both replacement parts and labour costs)**. However, there is potential for recourse against the parts supplier.

## Aim of this information pack

- This information package provides you with:
  - An **overview of product liability** under Australian Commonwealth Law.
  - Information on your **business rights and obligations** in the event of parts failure requiring your automotive repair business to undertake warranty work, both when the parts are purchased by you through a parts supplier or if provided by the consumer (i.e. the vehicle owner).
  - **Information and recommendations that may help when making a claim against a parts supplier** for the costs of the repair incurred as a result of the failure of the part used in the repair.

- This information is not a substitute for legal advice and does not cover all legal scenarios associated with product liability. Rather, it is a general guide to help MTAA member associations and their businesses members (including automotive repair businesses) to understand product liability better according to Australian Commonwealth Law.

### **Definition of product liability**

- Product liability is the legal liability of a manufacturer or trader (including automotive repair businesses) for producing or selling a faulty product.
- The liability of failed parts and the servicing, repair and maintenance of automotive vehicles that the customer considers is unsatisfactory is commonly referred to as issues of product liability.
- Product liability refers to the liability of any or all parties along the chain of manufacture of any product for damage caused by that product. This includes the parts supplier (including the manufacturer of component parts, an assembling manufacturer, and the wholesaler) and the retail store owner (i.e. the automotive repair business).

### **Product liability and Australian Commonwealth law**

- Australia's product liability laws are a mixture of:
  - **Legislation:** Determination of who is responsible and accountable for unsatisfactory automotive repair services and / or the failure of automotive parts is determined by rules set out in Commonwealth legislation and or interpretation of Commonwealth legislation; and
  - **Common law:** Determination of who is responsible and accountable for unsatisfactory automotive repair services and / or the failure of automotive parts is determined by a Court of law. In common law, the onus is on the automotive repairer to prove the parts supplier negligent or to have knowingly broken contractual arrangements and that loss or damage was suffered and caused by the parts supplier's (the defendant) conduct. Note: there are time limits to bring a case to court depending on jurisdictions.

- Consumer and business protection in relation to product liability under Commonwealth law and Legislation is in accordance with:
  - **Australian consumer law (ACL)**
  - **The common law tort of negligence**
  - **Contract law**

### **Australian consumer law**

- The ACL came into force on 1 January 2011 and replaced the Trade Practices Act 1974 and previous Commonwealth, state and territory consumer protection legislation. It is contained in the *Competition and Consumer Act 2010 (Cth)* (CCA) and is applied as a law of each state and territory by state or territory legislation. Consequently, the information outlined in this information pack must be considered alongside each Australian state and territory laws, legislation and regulation. Contact your MTA or automotive chamber of commerce for further information on your jurisdictional requirements.
- The ACL covers general standards of business conduct, prohibits unfair trading practices, regulates specific types of business-to-consumer transactions, provides basic consumer guarantees for goods and services, and regulates the safety of consumer products and product-related services.
- The ACL is a Commonwealth law which applies in the same way to all industry sectors (automotive and other wise) and in all Australian state and territory jurisdictions. It is focused on the:
  - *rights of consumers; and*
  - *obligations of businesses*
- **ACL is more focused on protecting consumers rather than protecting businesses from product liability.**
- The ACL also aims to promote competition between businesses in order to better deliver consumer products / outcomes.
- When a **consumer** buys goods or services, the ACL provides that they have guaranteed rights including that:
  - the supplier has the right to sell the goods;
  - the goods are of acceptable quality;
  - the goods match their description;
  - the goods are fit for any purpose that the consumer makes known to the supplier;
  - repairs and spare parts for the goods are reasonably available;

- the services are carried out with reasonable care and skill; and
  - the services are completed within a reasonable time where there is no agreed date.
- Although many of the consumer protections under the ACL (listed above) are relevant to many Australian automotive businesses, automotive businesses are not offered the same protection as consumers because: **an automotive business ceases to be a consumer if the goods are purchased to be resold or to be transformed into a product that is sold**. This means that if goods and services are purchased by an automotive repair business for use in a repair job, that automotive repair business does not have the rights of a consumer.
  - If the automotive repair business is provided with a part directly from the customer (i.e. the vehicle owner) to be used in the repair (e.g. parts purchased on-line) the automotive repair business is also not provided consumer rights nor is the vehicle owner. This is because the product is being used in a paid repair job undertaken by the automotive repair business.
  - Although ACL does not provide automotive businesses with the same protections as consumers it provides some limited protection to businesses by ensuring that businesses are not exposed to unfair and anti-competitive business practices including:
    - Uncompetitive agreements
    - Cartel conduct
    - Collective bargaining and boycotts
    - Exclusive dealing, minimum resale values
    - Miss-use of market power
    - Refusal to provide products and services
    - Unconscionable conduct
    - Protection in franchising arrangements
    - Unfair contracts
  - For example; unconscionable conduct is generally understood to mean conduct which is so harsh that it goes against good conscience. For example, a parts manufacturer who has prior knowledge that supplied parts are prone to failure continues to supply the product to market. However, if this is the case the automotive repair business may also / and / or likely seek compensation through the tort of negligence (outlined below)

*MTAA recommendation 1: Note and provide evidence of any assurances or lack of clarity or inconstancy or deceit from the manufacturer that the part was serviceable and correct for the repair undertaken or that the part may have a history of failure that you were unaware of at the time of purchase. These behaviours could be considered unconscionable conduct.*

- More detailed web-based information on ACL for businesses and consumers can be found using the link: <http://consumerlaw.gov.au>.

### **The common law tort of negligence**

- Although ACL provides only limited consumer protection for product liability to automotive repair businesses, there is more protection provided under the common law tort of negligence.
- It is generally accepted that the manufacturer of goods (including automotive parts suppliers) owes a *duty of care* to the purchaser and user to safeguard them against the foreseeable risk of failure.
- In the case of a claim by the automotive repair business (using the tort of negligence) for the cost of warranty work allegedly caused by a faulty part supplied by a parts supplier means the part supplier is the defendant and the automotive repair business is the plaintiff.
- Under common law, failure to recall a product that is potentially defective or prone to failure and which may cause harm, may amount to negligence and give rise to the obligation to pay compensation to persons (including automotive repair businesses) suffering injury, loss or damage as a result. For example, the parts supplier may have had reason to expect the part may fail or have any other reason to suspect the part may be prone to failure. In determining guilt for the parts supplier and to mandate the parts supplier to provide compensation to the automotive repair business, courts will consider issues such as:
  - Magnitude of potential harm
  - Probability of such harm occurring
  - Availability and effectiveness of alternative remedial action
  - Degree of knowledge in potential users of potential harm
  - Do not comply with a prescribed safety standard
  - Have been declared unsafe or permanently banned
  - Will or may cause injury to any person
- Retailers, importers and distributors are not required by law to test or inspect products which the manufacturer delivers in sealed containers which would not normally be opened until they reach the consumer. Regardless of this, under the requirements of the ACL automotive repair businesses are responsible to the consumer for the serviceability of the vehicle after the repair is completed.

- Consequently, in the automotive repair industry, automotive repair businesses should provide evidence of reasonable effort in their duty of care to the consumer (i.e. vehicle owner) to ensure that the part is serviceable and fit for purpose. It is also reasonable for the consumer (i.e. vehicle owner) to expect that automotive repair businesses install parts as instructed by the manufacturer using the automotive repair business's repairer's skills and knowledge as a certified / qualified automotive practitioner.
- This means that the automotive repair businesses have some ability to recoup damages from other businesses (including parts suppliers) within the supply chain (i.e. retailers, importers, distributors and manufacturers) for costs incurred due to failure of a supplied faulty part.
- It is possible for the automotive repair business to make a claim to the parts supplier for costs incurred as a result of a parts failure if they can prove that the parts supplier was negligent and / or the automotive repair business took all reasonable steps and fulfilled their duty of care to ensure the part was serviceable when installed.
- If the automotive repair business aims to make a case to prove that the failure of the repair was due to failure of the part supplied and not the fault of the automotive repair business and / or to make a claim against the parts supplier for costs incurred as a result of failure of the part, MTAA recommends the following for automotive repair businesses:

*MTAA recommendation 2: Implement and document work processes that provide evidence that the automotive repair business undertook all reasonable efforts to determine the part was serviceable; including removal from packaging and visual inspection.*

*MTAA recommendation 3: Provide evidence that the product used was correct (i.e. OEM part numbers etc.) as specified by the vehicle manufacturer. Less protection for the automotive repair business is likely if the part is purchased from a less credible source such as a cheaper, aftermarket online manufacturer with unknown manufacturing standards.*

*MTAA recommendation 4: Provide evidence of correct fitment / instillation. For example, provide evidence that the recommended tooling was used and the automotive repair workshop is of industry accepted standards.*

*MTAA recommendation 5: Ensure that the person who fitted / installed the part is qualified, experienced and has the knowledge (i.e. appropriate certification and licensing) to apply and use recommended manufacturer fitting processes and tooling.*

- If the parts supplier can prove that the automotive repair business had some responsibility in the failure the repair, the repairer could be required by the Court to contribute a determined proportion of the cost of the warranty repair work.
- To prove the parts supplier guilty of negligence, the automotive repair business needs to prove that:
  - The negligence of the parts supplier was a necessary in creating the parts failure (factual causation).
  - The scope of the parts suppliers' negligence contributed to the failure of the part or repair job (scope of liability). For example, if a gasket failed and the automotive repair business claims the parts supplier is guilty, the parts supplier may argue that the cooling liquid within the engine and engine operational conditions were more likely the reason for engine failure. Even if found guilty by the Court, the parts supplier may be only liable for a proportion of the costs.
- To the extent that any party in the supply chain adds to or modifies the part including packaging, labelling and fitment, that party will owe a common law duty to the purchaser and user in respect of those changes and the installation of the part. This means that any liability of the manufacturer / parts supplier is diminished if the part is modified by the automotive repair business in any way. However, if the recommended practice in its use requires modification for fitment (i.e. lapping surfaces or machining the part to achieve tolerances required for installation) the manufacturer's / part supplier's duty of care to provide serviceable parts to the automotive repair business likely remains. It is also the parts supplier's obligation to provide any warnings and direction for parts installation and use or at least direct users to where it may be accessed.

## **Contract**

- Parties (including automotive repair business and parts suppliers) are free to enter into contracts on terms agreed between them, subject to terms implied into the contract by common law or statute. For example, an automotive repair business and parts supplier are able to enter into a contract that stipulate that the parts supplier may pay for warranty repair if the following occurs:
  - The goods or services do not correspond with their description;
  - Goods or services are of unacceptable quality;
  - Goods or services do not conform to samples provided;
  - Goods or services are unfit for stated purpose; and
  - Goods or services are non-compliant with warranties that may be provided.

- The parts supplier cannot be forced to sign or become a party to a contract outlining the above terms. However, the automotive repair business has a choice to purchase from a parts supplier who will.
- The importance of contract as a cause of action in product liability claims has diminished in recent times as a result of the growth of the law of negligence and the statutory causes of action i.e. under ACL.

*MTAA recommendation 6: If parts suppliers are willing to enter into contractual arrangements as outlined above, MTAA recommends that automotive repair businesses use those part suppliers. However it is a business decision for individual automotive repair businesses as the purchase price of parts is likely higher due to increased risk for the parts supplier.*

### **Product liability insurance**

- The above information shows that automotive repair businesses have limited recourse for product liability. It also shows that automotive repair businesses are often required by the ACL to undertake warranty work for their customers if their repair work fails or is considered unsatisfactory by the consumer due to a parts failure and the automotive repair business cannot prove the parts supplier was negligent or had failed to abide by contractual arrangements.
- For these reasons a number of insurance companies offer product liability insurance. Product liability insurance is designed to protect businesses against the financial losses incurred as a result of somebody making a claim against your business for personal injury, property damage or repairs that were unsatisfactory to them.
- Depending on the conditions of the insurance policy purchased, your business may not be required to make claims against the part supplier for the failure of parts supplied and / or the insurer may make a claim on your behalf.
- The price of product liability insurance and the conditions of the policy is negotiated between individual businesses and insurance companies.
- The requirements to purchase product liability insurance is dependent on the commercial requirements and conditions of individual businesses and the MTAA does not make recommendations as to whether an automotive repairer businesses should or should not purchase product liability insurance.

*MTAA recommendation 7: If making a decision to purchase product liability insurance, it is recommended that the product disclosure statement (PDS) be examined and understood before any decision is made.*

**Please note:**

This document cannot be relied upon for any legal reason or activity. Each Australian State and Territory legal system has unique interpretations of Australian Consumer Law and how it is applied in their own markets. Consequently, this briefing note is a guide only and should be used in conjunction with information materials and advice provided by MTAA state and territory association's advice and with appropriate legal advice.